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CLAYBORN, et al. v. CAMILLA RED ASH COAL CO., Inc., et al.

Nov. 18, 1920.

[105 S. E. 117.]

1. Mines and Minerals (§ 55 (6)*)—Coal Company, Holding a Deed Conveying Coal Only in a Certain Tract, Cannot Use Such Tract for Haulage of Coal from Another Tract Leased by It; "Incorporeal Hereditament."—A coal company, holding deed conveying to it all the coal on, in, or under a tract of land, and owning and operating a coal lease on an adjoining tract, could not use an underground haulway through the first tract, originally used for bringing out coal mined on such tract, to bring out coal mined on the second tract, the right to mine and remove coal being an "incorporeal hereditament," an easement expressed in or incident to the grant of the fee, in the exercise of which the grantee cannot put an additional burden on the servient estate, as by such hauling of coal mined elsewhere.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incorporeal Hereditament.]

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 831.]

2. Injunction (§ 48*)—Continued Trespass by Coal Company through Use of Underground Haulway Will Be Enjoined.—Where the coal in a particular tract is conveyed to a coal company which opens an underground haulway through the tract, and finally uses such haulway to bring out, not only coal mined on the tract, but also coal mined on an adjoining tract, such violation of the rights of the grantor of the coal on the first tract is a continued trespass, for which the only adequate remedy is by injunction.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 525.]

3. Injunction (§ 1*)—Grant of Writ Lies in Discretion.—The writ of injunction is summary and extraordinary, and does not lie ex debito iusticiæ, but its granting rests in sound judicial discretion, to be exercised on consideration of the nature and circumstances of the case.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 629.]

4. Injunction (§ 48*)—Use of Surface of Tract in Connection with Operations on Adjoining Tract an Enjoinable Continuing Trespass.—Where a coal company owns and is mining the coal in two adjoining tracts, its use of the surface of one tract as a passageway for men and stock in getting to the other tract in connection with the mining thereon is a continuing trespass, entitling the owners of the surface of the first tract to injunction.

Prentis, J., dissenting.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 525.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Appeal from Circuit Court, Russell County.

Suit by W. F. Clayborn and others against the Camilla Red Ash Coal Company, Incorporated and others. From decree denying relief, plaintiffs appeal. Reversed.

G. B. Johnson, of Honaker, and *S. H. & Geo. C. Sutherland*, of Clintwood, for appellants.

Bird & Lively, of Lebanon, *McClagherty*, *Scott & Richmond*, of Bluefield, for appellees.

WHITE SEWING MACH. CO. *v.* GILMORE FURNITURE CO.¹

Nov. 18, 1920.

[105 S. E. 134.]

1. Principal and Agent (§ 148 (4)*)—Seller Responsible for Fraud of Agent Despite Statement that Only Claims in Written Order Would Be Recognized.—Where an order given for sewing machines under fraudulent representations of the seller's agent stated that no claim between the seller and its buying dealer would be recognized except such as was embraced in written orders, the seller was nevertheless responsible for the fraudulent methods of its agent, relied on by the buying dealer at the time of the sale.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 274.]

2. Sales (§ 52 (1)*)—False Representations to Buyer Presumed to Have Been Relied on by Him.—While the false representations relied on by a buyer to escape the building effect of the contract of sale must be relied on by him at the time the contract is entered into, when the seller has made a false representation which would naturally induce a buyer to contract on its faith, it will be inferred the buyer was induced thereby to contract, and he need not show reliance by him, but the seller, to discredit the inference, must either prove that the buyer knew that the representation was false, or show by his conduct he relied on his own judgment.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 875.]

3. Appeal and Error (§ 231 (3)*)—Court Will Not Search for Objectionable Portions of Testimony Partly Admissible.—Certificate showing in general terms that counsel objected to the introduction of evidence consisting of 15 questions and answers is insufficient to sustain objections to the admission of such evidence, as the Supreme Court will not endeavor to discover the objectionable portions of testimony partly admissible at least.

4. Evidence (§§ 122 (2), 443 (2)*)—Personal Guaranty Signed by Fraudulent Selling Agent Admissible as Res Gestæ, Not Varying

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.